



U.S. Department of Justice

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Privileged Settlement Communication
Subject to Fed. R. Evid. 408

February 17, 2011

VIA ELECTRONIC MAIL - PDF

Robert Sanoff, Esq.
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Seaport World Trade Center West
155 Seaport Boulevard
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Dear Robby and Jon,

As discussed during our conversation on February 3, 2011, we thought it would be helpful for us to provide you with a writing in which we summarize the structure of the settlement that we now envision. We then look forward to hearing at least your preliminary views when we speak later today. Assuming that we have a basis to go forward at that point, we anticipate turning our attention to drafting a Consent Decree and providing that draft to you in the weeks immediately following. Based on our previous discussions, some of what follows is, we think, well known to you, but we set it out here so that we can confirm that we are, in fact, in agreement on the structure of the proposed settlement.

Although this letter makes no attempt to set forth all of the terms that would be included in the Decree, we can state now that it would be generally based upon our model for "ability-to-pay" settlements. We anticipate that CDE would receive covenants under sections 106 and 107 of CERCLA for the South Plainfield Site. (CDE would not receive covenants with respect to any other sites, including, but not limited to, Ex 7(a) - Int with Enf) As it is an ability to pay Decree, there would also be provisions conditioning the covenants on CDE certifying that it has provided complete and accurate financial and insurance information to the United States. The Consent Decree would include standard reservations, but we note that we are working with the natural resource trustees and do hope to resolve their claims at the Site in this settlement.

The payment provisions will be rather complex, with several components. *First*, the Decree would require an upfront payment amount to be paid within thirty days of entry of the

Consent Decree. The amount we currently have in mind for this payment is \$1.25 million.

Second, CDE and FPE would admit to a judgment amount. This amount would be expressed either in terms of a percentage of the response costs incurred or to be incurred at the Site or as a specific dollar amount. We anticipate that the judgment amount would be in the range of 70% of (i) EPA's Site response costs, which are anticipated to be in the neighborhood of \$325 million, and (ii) if the trustees participate, natural resource damages. This judgment amount would be explicitly made payable solely out of the insurance proceeds to be recovered primarily from Allstate (South Plainfield) and Exxon/Lloyds, but also other carriers under whose policies CDE or FPE may recover.

Third, the upfront payment mentioned above is understood by the United States to be less than CDE's actual total ability to pay, particularly when viewed over a several year time period. CDE's "additional" ability to pay obligation would, in our conception, be fulfilled by CDE's ongoing payment of the attorneys fees incurred by Foley Hoag LLP as a result of CDE's agreement in the Decree to pursue, with best efforts, the Exxon insurance claims litigation. We envision this additional amount to be the bulk of CDE's ability to pay. Also, this "additional" ability to pay amount would not be set aside in a litigation escrow account or trust fund.

Finally, the payment provisions of the Consent Decree would provide that the United States and New Jersey would receive 100% of the proceeds from CDE's settlement of its Allstate South Plainfield Site insurance claim. In addition, the Decree would provide for a division of all cumulative future proceeds received by CDE and/or FPE from their South Plainfield insurance claims. In light of the very large shortfall that the United States anticipates with respect to cost recovery at the South Plainfield Site it is imperative that the United States receive the vast majority of those proceeds. While we do understand that the prospect of a return from the insurance litigation will provide an incentive for CDE to pursue the claims vigorously, we believe that an appropriate share of the recovered proceeds for the United States and New Jersey collectively is:

First \$4 million	100%
next \$16 million (\$4 - \$20 million)	85%
next \$30 million (\$20 - \$50 million)	80%
\$50+ million	85%

CDE would receive the remaining funds.^{1/}

^{1/} By way of example, if the total insurance proceeds (over and above the Allstate South Plainfield Site proceeds) were, say, \$52 million, the United States and New Jersey would collectively recover 100% of the first \$4 million (\$4 million) + 85% of the next \$16 million (\$13.6 million) + 80% of the next \$30 million (\$24 million) + 85% of \$2 million (\$1.7 million), for a total of \$43.3 million. CDE would recover \$8.7 million.

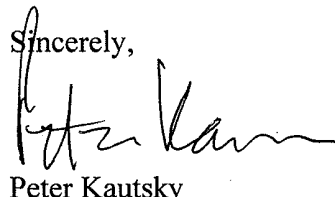
The Consent Decree would provide that the share received by CDE from the insurance litigation will be set aside by the company in a separate fund to be applied to future environmental liabilities. Although the United States has no objection to CDE apportioning such funds among various such liabilities, the United States does not intend to be involved in any apportionment (nor will the United States commit to respect such apportionment to the extent that CDE seeks to shelter funds that would otherwise be available to the United States for recovery at other sites).

We envision that two other procedural aspects of the settlement structure would be addressed in the Decree. First, we would like to explore with you your suggestion that Foley Hoag might fund the insurance litigation if CDE funds are no longer available for this purpose. Second, we are currently comfortable with the United States not playing a role in the litigation of the insurance claims and not exercising a veto power over decisions made in the litigation, including, in particular, a decision to settle the claims. However, the Consent Decree will need to include a requirement that CDE submit a quarterly report to the United States on the progress of the insurance litigation.

We also want to make sure that you are aware that we contemplate using this Consent Decree as a vehicle to settle any potential contribution claims that CDE and FPE may have against the United States based on alleged federal involvement at the Site. We are working with the appropriate persons within DOJ at this time on this aspect of the case. There is also some chance that DSC may also be included in the settlement, but we are not at all certain of that.

It should be noted that the conception of the settlement set forth above is based on our still somewhat preliminary thinking. In particular we emphasize that the position stated above on any one aspect of the overall structure could change if changes are made to other aspects of it. And, as you know, the above settlement offer remains subject to the review and approval of management at EPA, NOAA, DOI, and the Department of Justice.

We look forward to continuing our discussions with you on this subject. To that end, we are still planning on speaking with you on February 17, 2011 at 3:30 p.m.

Sincerely,

Peter Kautsky
Rachel Evans
Trial Attorneys